Supreme Court, U.S.
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No. 94-619

In The Supreme Court of the United States

October Term, 1994

VEMCO, INC.,

Petitioner,

vs.

JOHN CAMARDELLA, THOMAS E. MARK, RICHARD AQUINO, JOHN DOE(S) and FLAKT, INC.,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW IF PETITION FOR WRIT OF CERTIORARI WERE GRANTED

Were this Court to grant petitioner's Petition For A Writ Of Certiorari only one question would be presented for review: Do the facts alleged by the petitioner in its Amended Complaint satisfy the "continuity" component of a RICO "pattern" of racketeering activity under 18 U.S.C. §1962(c)?

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STATEMENT OF THE CASE

This action involves a dispute over contracts under which the defendant-respondent Flakt, Inc. ("Flakt") agreed to install a paint finishing system in a plant operated by the plaintiff-petitioner Vemco, Inc. ("Vemco").[1/] Flakt contended that it had agreed to "cap" at $15 million the cost of the system *as described in a May 14, 1987 study*. Vemco contended that the $15 million was to cover the system *as actually installed*, including the cost of Owner's Change Requests ("OCRs"). Vemco also contended that the system installed by Flakt was unsatisfactory and that Flakt had not finished the system in a timely manner.

Vemco brought two lawsuits. The first lawsuit sought to require arbitration of the contract disputes and to require Flakt to turn over certain documentation to Vemco; the second lawsuit was this RICO action. In this RICO action, Vemco alleged that Flakt and certain Flakt officers engaged in racketeering activity by falsely promising to complete the project for $15 million, by falsely promising to complete the project in a timely fashion, and by insisting on repayment of Flakt's costs in excess of $15 million.

1/ ABB Flakt, Inc. (the name by which Flakt, Inc. is now known) is wholly-owned by Asea Brown Boveri Inc. Asea Brown Boveri Inc. is wholly-owned by ABB Asea Brown Boveri Ltd., which in turn is owned in equal parts by Asea, AB, a publicly-traded Swedish corporation, and Brown Boveri Corporation, a publicly-traded Swiss Corporation. ABB Flakt, Inc. has no subsidiary companies except wholly owned subsidiaries.

SUMMARY OF ARGUMENT

This case was decided on the peculiar facts alleged by Vemco in its Amended Complaint. It does not present the "Questions Presented" set out in the Petition or any other broad or disputed question of law.

In this case, the Sixth Circuit *followed H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); its decision does *not* conflict with *H.J. Inc.* Nor does the decision in this case conflict with *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990), which was decided before *H.J. Inc.*

ARGUMENT

REASONS FOR DENYING THE WRIT

In this case, a Magistrate Judge, a District Court Judge and a three-judge panel of the United States Court of Appeals for the Sixth Circuit unanimously found that Vemco had failed to allege sufficient facts to satisfy the "continuity" component of a RICO "pattern" of racketeering activity under 18 U.S.C. §1962(c). None of the Sixth Circuit judges requested a vote on Vemco's suggestion for rehearing *en banc*. This case depends on its own peculiar facts, and there is no reason for reviewing the decision by writ of certiorari.[2/]

2/ The Sixth Circuit also affirmed dismissal of Vemco's (continued...)

I. The Petition Misstates The Questions Presented

This case does not present any of the three "Questions Presented" set out at pages i, 14, 16, and 17 of the Petition.

1. The Sixth Circuit did *not* devise a "single construction project" rule. It did *not* rule that predicate acts cannot constitute "multiple schemes" under RICO if they "relate to a single construction project." *See* Petition at i and 14. Rather, in a discussion of *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990), the Sixth Circuit stated that [A.10 (emphasis added)]:

> We do not find that a defendant who engages in several different forms of fraud for *a single purpose*, to defraud *a single victim* through activities surrounding *one construction project*, *without more*, has engaged in more than one criminal scheme.

Vemco failed to allege "more."

Furthermore, the Sixth Circuit, following *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), expressly stated that multiple schemes were *not* necessary to a RICO "pattern." [A.7.] Vemco relies on a mischaracterization of one sentence it plucks from the Sixth Circuit's opinion which was not crucial to its decision.

2/(...continued)
claim under 18 U.S.C. §1962(a). Vemco's Petition does not seek review of the dismissal of that claim.

2. The Sixth Circuit did *not* rule that acts in violation of a court order were "immunize[d] . . . from ever counting as part of a pattern of racketeering." *See* Petition at i and 16. It did *not* "implicitly conclude[] as a matter of law that oppressive conduct that violates a court order cannot constitute predicate acts for RICO." Petition at 16. The Sixth Circuit simply ruled that the act alleged by Vemco -- an alleged failure to turn over documents called for by a court order obtained by Vemco -- was "too unrelated and distinct" to be part of a "pattern" of allegedly fraudulent promises. [A.8.]

3. The Sixth Circuit did *not* rule that "the actions of alleged racketeers involving a single victim and a single scheme for a single purpose over four years" could never constitute a RICO violation. *See* Petition at i and 17. The Sixth Circuit ruled that the particular acts alleged by Vemco did not constitute a RICO violation (and that the alleged "pattern" lasted only 17 months).

II. The Petition's "Reasons" For Allowing The Writ Are Invalid.

A. The Decision Of The Sixth Circuit Does Not Conflict With This Court's Decision In *H.J. Inc. v. Northwestern Bell Telephone Co.*

Vemco stretches the opinion of the Sixth Circuit in this case well beyond its breaking point in an attempt to find a "conflict" between that decision and this Court's decision in *H.J. Inc.* There is no conflict.

Vemco correctly states that (Petition at 14)(emphasis added):

> In *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) the Court held that the existence of only one scheme to defraud does not automatically preclude the finding of a pattern under RICO. *The Sixth Circuit recognized this holding in H.J., Inc. at page 7 of its opinion . . .*

Indeed, not only did the Sixth Circuit "recognize" this Court's holding in *H.J. Inc.*, the Sixth Circuit had concluded prior to *H.J. Inc.* that one scheme to defraud can, under the right facts, make up a RICO pattern. *See United States v. Jennings*, 842 F.2d 159, 163 (6th Cir. 1988)(two predicate acts potentially enough), cited in *H.J. Inc.*, 492 U.S. at 235 n.2; and *Blue Cross And Blue Shield Of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989)("[w]e agree with the Seventh Circuit that . . . [t]he proposition that the predicate acts must always occur as part of separate schemes . . . cannot be accepted as a general rule").

However, Vemco goes on to state that, "the Sixth Circuit *appears* to fall back to the multiple scheme test . . ." Petition at 14 (emphasis added). There is no such appearance. The Sixth Circuit did *not* "fall back" to an erroneous test that would be inconsistent with both *H.J. Inc.* and its own prior decisions.

Vemco also states that "the Sixth Circuit *appears* to have misread Vemco's allegations." Petition at 15 (emphasis added). Not true. The Sixth Circuit did not misread Vemco's allegations. Furthermore, the writ of certiorari is not designed to review a lower court's reading of a complaint.

B. There Is No Conflict Between The Sixth Circuit's Decision In This Case And The Decision In *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*

There is no conflict between the Sixth Circuit's decision in this case and the decision in *Procter & Gamble Co. v. Big Apple Industrial Buildings, Inc.*, 879 F.2d 10 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990). *Procter & Gamble* was decided before this Court's decision in *H.J. Inc.*, and the Sixth Circuit noted that the court's definition of continuity in *Procter & Gamble* was "overinclusive in light of the Supreme Court's subsequent decision in *H.J. Inc.*" [A.10.]

There is no conflict between two cases dealing with different facts, one of which was decided before and the other of which was decided after *H.J. Inc.*

C. Errors By Other Courts In Other Cases Are Wholly Irrelevant

Contrary to the argument at Petition 20-22, the fact that various courts in earlier cases had erroneously required a conviction, "racketeering injury," multiple schemes or a profit generating purpose for a RICO violation is wholly irrelevant to the question of whether the Sixth Circuit in this case erred or whether its decision should be reviewed by writ of certiorari. Petitioners seem to argue that "other courts have been wrong in the past, so the Sixth Circuit is wrong here." Of course, that argument is specious.

Finally, it is *not* true that the Sixth Circuit ignored its decision in *Blue Cross And Blue Shield Of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989), and held that

"allegations of a single victim are . . . a barrier to stating a cause of action under RICO." Petition at 22. The Sixth Circuit held only that the allegations of Vemco failed to state a cause of action under RICO.

CONCLUSION

For the reasons stated above, we respectfully request the Court to deny the Petition.

Dated: November 7, 1994

Respectfully submitted,

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